IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13715 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SWAMISHRI SHYAM NARAYANCHARYA GURU DEVKRASHNACHARYA - Petitioners

Versus

MANIBEN BHAAGWATACHARYA & 3 - Respondents

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Appearance :
MR MEHUL S SHAH for Petitioners.
DELETED for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2 - 3.
MR ANSHIN H DESAI for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 24/08/2007
ORAL JUDGMENT

1. The petitioners – original plaintiffs have filed the petition under Article 227 of the Constitution of India praying for quashing and setting aside the order passed by the learned Civil Judge (J.D.), Talala on 15.02.2003 below an application Exh.122 in Regular Civil Suit No. 436 of 2002 whereby the present respondent No. 4 was ordered to be joined as party – defendant in the said suit.

2. This Court has issued notice on 18.09.2003 and ad-interim relief in terms of para 8 (c) was granted whereby the implementation and operation of the order passed by the learned Civil Judge (J.D.), Talala on 15.02.2003 below an application Exh.122 in Regular Civil Suit No. 436 of 2002 was stayed. Despite the said order was stayed by this Court on 18.09.2003, an amendment in the suit was carried out on 16.09.2004. The Court, thereafter issued rule on 01.04.2005 and further proceedings of Regular Civil Suit No. 436 of 2002 were stayed.

3. It is the case of the petitioners that the petitioners have

instituted Civil Suit No. 96 of 1982 at Junagadh which was later on transferred to the Talala Court and registered as Regular Civil Suit No. 436 of 2002. The said suit was filed for possession of the suit property. In the said suit, the respondent No. 4 has moved an application Exh. 122 for joining him as party on the basis of an agreement to sell said to have been executed on 29.02.2000 which is not registered and hence, it is not admissible in evidence. The petitioners have objected to the said application. Without considering the said objections and in complete disregard of the settled legal position, the learned Civil Judge has granted the said application Exh. 122 and permitted the respondent No.4 to be joined as party – defendant in the said suit.

4. Mr. Mehul S. Shah, learned advocate appearing for the petitioners has submitted that the respondent No.4 is not a proper and necessary party in the suit and hence, he was not required to be joined as party – defendant. The alleged agreement to sell on the basis of which respondent No. 4 has moved an application to be joined as party is an unregistered document and hence, on the basis of such unregistered document, that too executed

during the pendency of the suit, and without taking leave of the Court, the respondent No.4 cannot be permitted to be joined as party in the suit. In support of his submission, he relied on the decision of the Hon'ble Supreme Court in the case of **Bibi Zubaida Khatoon V/s. Nabi Hassan Saheb and another, AIR 2004 SUPREME COURT 173** wherein it is held that there is no absolute rule that the transferee pendente lite without leave of the Court should in all cases be allowed to join and contest the pending suits. After quoting Section 52 of the Transfer of Property Act, the Hon'ble Supreme Court has observed that the defendants in the suit were prohibited by operation of S. 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the Court. Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of S. 52. Under these circumstances, the Hon'ble Supreme Court has held that the respondents cannot be considered to be either necessary or proper parties to the suit.

5. Mr. Shah has further relied on the decision of this Court in the case of **Rasiklal Shankerlal Soni V/s. Natverlal Shankerlal Upadhaya and others, (1975) 16 GLR 533** wherein it is held that under Sub-rule (2) of rule 10 of Order 1 of the Civil Procedure Code, a person may be added as a party to the suit in two cases only, namely (1) when he ought to have been joined and is not joined, that is, whenever he is a necessary party; and (2) when without his presence the suit cannot be completely adjudicated. There is no jurisdiction to add a party in any other case merely because that would save a third person the expense and botheration of a separate suit for seeking adjudication of a collateral matter, which was not directly and substantively in issue in the suit into which he seeks inclusion. The question whether a person should be added as a party to the suit or not depends on the nature of the suit and the allegations made in the pleadings. The necessary party in a suit for specific performance of contract for sale are parties to the contract or if they are dead their legal representatives as also a person who purchased the property from a vendor after the contract. Where a

person sues for specific performance of an agreement of sale impleading the executent of the agreement as a party, there is no necessity to determine the question of vendor's title. The fact that the title which the purchaser may acquire might be defeasible by a third party as for example, by the persons claiming right to the property under Hindu law, is no ground for refusing specific performance, if the purchaser is willing to take such title as the vendor has. A simple suit for specific performance on agreement of sale cannot be allowed to be converted into a suit for title. The Court further observed that if the plaintiff is willing to take the risk, he can get whatever title his vendor has. A simple suit for specific enforcement of an agreement cannot be permitted to be converted into a suit for establishing title and that too against the wish of the plaintiff.

6. Mr. Shah has further relied on the decision of this Court in the case of **Noormohmad Hajishama V/s. Anand Mohan Bhardwaj and others, (1981) 22 GLR 332** wherein it is held that Sub-rule (2) of Rule 10 of Order 1 of the Civil Procedure Code invests the Court with discretion to add a party as co-defendant to the suit.

Ordinarily, the discretion will not be exercised in the face of opposition from the plaintiff. The Court, may in a fit case, over-rule the objection of the plaintiff if it finds it necessary to implead the third party as a co-defendant to enable it to effectually and completely adjudicate upon and settle all questions involved in the suit. In this case, the Court held that the question whether the property is evacuee property or otherwise, the real contesting parties are the plaintiff on the one side and the officers of the Union of India on the other side. If the order or decision of the Union of India declaring the property in question to be evacuee property is upheld, then the order of allotment in favour of the allottee will stand. If on the other hand it is found that the property was wrongly declared to be evacuee property and that, in fact, it was never evacuee property, the order of allotment in favour of allottee will automatically collapse. The allotment to the allottee is on the basis that the property is evacuee property. If that basis disappears, the order of allotment cannot stand. The presence of the allottee is not at all necessary to effectually and completely adjudicate upon and settle the question regarding the legality of the declaration and questions

incidental thereto. It is clear that the allottee is neither a necessary nor a proper party to the suit. The discretion should not be exercised lightly as it confers certain rights on the added party and entails certain consequences which the plaintiff would be justified in avoiding, because he cannot be expected to litigate with a party with whom it is unnecessary to litigate.

7. Based on the aforesaid judgments of this Court as well as the Hon'ble Supreme Court, Mr. Shah has strongly urged that the learned Civil Judge has committed a grave error jurisdictionally by allowing the application Exh. 122 and permitted the respondent No. 4 to be joined as party. He has further submitted that dispute between the petitioners and the original defendants are with regard to the property which in fact was the Trust property and the defendants were in illegal possession, from whom the possession was sought for by seeking necessary declaration and injunction in the suit. Despite the fact that the suit was filed in 1982, the agreement was said to have been executed by the original defendants in favour of respondent No. 4 in the year 2000. It was only with a view to deprive the petitioners' possession of the said

property, such agreement was executed without taking prior leave of the Court and hence, the said agreement is not an admissible evidence in the suit. He has, therefore, submitted that simply on the basis of the said agreement, respondent No.4 should not be joined as party in the suit and the application Exh.122 ought to have been rejected by the learned Civil Judge.

8. Mr. Anshin Desai, learned advocate appearing for respondent No. 4, on the other hand, has urged that the order passed by the learned Civil Judge cannot be said to be an order passed in excess of jurisdiction or is in violation of the principles of natural justice or an ex-facie illegal or perverse order and hence, this Court should not interfere in the said order while exercising its extraordinary writ jurisdiction under Article 227 of the Constitution of India. He has further submitted that the order passed by the learned Civil Judge is a discretionary order and under Order 1, Rule 10 discretion is vested with the Civil Court to join respondent No. 4 as a party in the suit. Looking to the facts and circumstances of the case and considering the relevant statutory provisions as well as the decided case law, the learned Civil Judge has

exercised the discretion in favour of respondent No.4. Since the agreement was executed in his favour and he is having the interest in the suit property, he is a proper and necessary party and the subject matter of the suit cannot effectively be adjudicated upon without the presence of respondent No. 4.

9. In support of his submission, he relied on the decision of the Hon'ble Supreme Court in the case of **Savitri Devi V/s. District Judge, Gorakhpur and others, (1999) 2 SCC 577** wherein it is held that Order I, Rule 10 C.P.C. enables the Court to add any person as party at any stage of the proceedings if the person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision in the Code.

10. Mr. Desai further relied on the decision of this Court in the case of **Navnitbhai Harmanbhai Patel V/s. Patel Rameshbhai Ambalal and others, (1996) 37 (2) GLR**

129 wherein it is held that ordinarily, while effecting the partition by metes and bounds the Civil Courts are always effecting the partition in such a way that a person whose right over a particular share is in cloud in other pending proceedings is given that very property so that collusive decree of partition rights of such third party are not prejudicially affected to their disadvantage in their absence. The presence of such third party, therefore, in such fact-situation becomes absolutely necessary so that properties are partitioned clearly and in a manner not giving any rise to the future dispute or litigation. One of the objects of Order 1 Rule 10 C.P. Code is to avoid multiplicity and litigations are finally and effectively adjudicated upon by the Courts of competent jurisdiction. The Court further observed that the only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action. The question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of rule between the direct interest or legal interest or commercial interest. It is, therefore, necessary that the

person must be directly or legally interested in the final result of the action, i.e. to say that the result of the litigation should not be such which would affect him illegally, i.e. by curtailing his legal rights.

11. Mr. Desai further relied on the decision of this Court in the case of **Ramchandra Chaudharimal Relvani and another V/s. Heirs and L.R.s of deceased Nanakram Teumal and others, 1994 (1) G.L.H. (U.J.) 14** wherein it is held that it is well settled principle of the law that as far as possible, multiplicity of litigation should be avoided. If the parties who are sought to be joined are not permitted to be joined as party defendants, then the dispute involved in the suit may not be effectively and completely adjudicated upon. Order 1 Rule 10 of the Civil Procedure Code inter alia provides that wherever the Court may find it necessary that in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit, the Court may order that such parties be joined in the proceedings.

12.Mr. Desai further relied on the decision of this Court in the case of **Physical Research Laboratory V/s. Bhat Gopalak & Ganotiyas Sahkari Khoti Mandali Limited, (1983) 24 (1) GLR 661** wherein while reversing the order passed by the learned Civil Judge, the Court held that the learned Civil Judge is quite clearly in error in stating that the present petitioner is neither a necessary nor a proper party. In fact the present petitioner is not only proper but also necessary party in this suit because on the averments made in the third party application the petitioner is in possession of as many as 50 acres of the suit land and that the State having received the sale price of the land and having handed over possession of 50 Acres of land to the present petitioner, the State would not be directly concerned as regards that portion of the suit land.

13.Mr. Desai has further relied on the decision of this Court in the case of **Ushaben Narendra Kolekar V/s. BarAnandiben Vishnuprasad Trivedi, 1996 (3) GCD 515 (Guj.)** wherein it is held that it cannot be said that the Trial Court has no jurisdiction to entertain and decide the suit under Order 1, Rule 10 of the CPC

especially when the defendant No. 3 has already averred and alleged that by registered sale-deed the parcel of land including the disputed land is sold to him and therefore he is necessary or proper party which is required to be impleaded in the suit. In such a situation, the trial court was fully justified in entertaining the application and granting the same because the claim of the petitioner – defendant being counter-claim which is to be treated as separate suit is still pending in the court and as such presence of third party is necessary to effectively and finally adjudicate upon the issues which may arise with respect to the property in question.

14. Mr. Desai has further relied on the decision of this Court in the case of **Rajendrasinh Bharatsinh Sarvaiya V/s. Kiritsinh Balvantsinh Jadeja and another, (2004) 45 (1) GLR 106** wherein it is held that the necessary consideration before the Court while determining the question of impleadment of a party to the proceedings is whether the said party is necessary or proper party and presence of such party before the Court is necessary for complete and effective adjudication of the subject matter. The proper party is one whose presence is

considered appropriate for effective decision of case.

15. Based on the aforesaid judgments and considering the facts of the case, Mr. Desai has strongly urged that the trial court is fully justified in granting the application Exh.122 and in permitting the respondent No. 4 as party – defendant in the suit. He has, therefore, submitted that no interference is called for in the impugned order of the learned Civil Judge while exercising powers under Article 227 of the Constitution of India.

16. After having heard learned advocates appearing for the respective parties and after having gone through the relevant provisions contained in the Civil Procedure Code as well as Transfer of Property Act and after having considered the authorities cited by the learned counsels in support of their respective submissions, the Court is of the view that there is no dispute about the proposition that under Order 1, Rule 10 of CPC, the Court is vested with discretion and wherever the Court may find it necessary that in order to enable the Court to effectively and completely adjudicate upon and settle all the

questions involved in the suit, the Court may order that such parties be joined in the proceedings. However, the Court is also supposed to take into consideration as to at what stage, such application is moved by the third party. Here in the present case, the suit is filed in 1982 and the application Exh. 122 is filed by the respondent No. 4 on 16.01.2003. The main basis on which the said application was filed by the respondent No. 4 was that the original defendant Nos. 1 & 2 have executed an agreement to sell in his favour on 29.02.2000. The question, therefore, assumes significance in this wise that during the pendency of Civil Suit No. 96 of 1982 which was later on converted in Regular Civil Suit No.436 of 2002, the said agreement to sell was entered into and that too without taking any leave from the competent Court where the suit was pending. The application Exh. 122 is, therefore, clearly hit by the provisions contained in Section 52 of the Transfer of Property Act. Section 52 of the Transfer of Property Act reads as under :-

"52. Transfer of property pending suit relating thereto :-

During the pendency in any Court having authority within the limits of India excluding the State of Jammu

and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not cllusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

17. This provision has come up for consideration before the Hon'ble Supreme Court in the case of **Bibi Zubaida Khatoon V/s. Nabi Hassan Saheb and another** (Supra) in the context of seeking impleadment by the third party – transferee and as stated earlier, the Hon'ble Supreme Court has observed in no uncertain terms that the defendants in the suit were prohibited by operation of S. 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the Court. Admittedly in the present case, no permission is sought for before execution of the agreement to sell in favour of respondent No. 4. Therefore, the alleged alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52 of the Transfer of Property Act. Based on this decision, the Court is of the view that the respondent No. 4 cannot be considered to

be ether necessary or proper party to the suit.

18. In view of the aforesaid decision of the Hon'ble Supreme Court and in view of the finding arrived at by the Court, the decisions cited and relied upon by Mr. Desai in support of his contention would not have much relevance as none of these decisions deal with the effect of Section 52 of the Transfer of Property Act, in relation to the agreement to sell said to have been executed by the original defendants in favour of the respondent No.4 during the pendency of the suit. The impugned order is, therefore, unsustainable and it is accordingly quashed and set aside.

19. The petition is accordingly allowed. Rule is made absolute without any order as to costs. Since the suit is of 1982, the Trial Court is hereby directed to decide it as expeditiously as possible, preferably on or before 31.03.2008.

Sd/-

[K. A. PUJ, J.]

Savariya